In The

Supreme Court of the United States

October Term, 1977

No. 77-58

WILLIAM J. CHLEBORAD, M. D.,

Petitioner,

vs.

ROGER CHARTER, Individually and as Assignee,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Please see Appendix A and Appendix B of the Petition for a Writ of Certiorari.

JURISDICTION

Supplementing the jurisdictional facts set forth by Petitioner, when the Complaint was filed the Plaintiff-Respondent was a resident and citizen of Iowa and the Defendant-Petitioner was a resident and citizen of Nebraska, thereby creating diversity jurisdiction (C. A. Appendix 6).

QUESTIONS PRESENTED

Respondent accepts questions raised by the Petitioner at Pages 3 and 4 of the Petition for Writ of Certiorari.

STATUTORY PROVISIONS INVOLVED

Fed. Evidence Rule 411, 28 U. S. C. A.:

"Liability Insurance. Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. *This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of* agency, ownership, or control, or *bias or prejudice of a witness.*" (Emphasis supplied.)

STATEMENT OF THE CASE

Roger Charter, age 17 years, and a gifted athlete, was struck by a truck on June 29, 1973. He was promptly removed to a hospital at Fremont, Nebraska and placed under the care of Petitioner, a surgeon. Without seeking consultation with orthopedic or vascular specialists, or referring the patient to one of several hospitals staffed with such specialists in Omaha (35 miles distant), and without alerting the parents to the perils of orthopedic and vascular complications, tissue death, infection or possible amputation, Petitioner elected to close the wounds with retention sutures following emergency surgery and

thereafter enclosed both legs in circular plaster-of-paris casts from ankles to above the knees. Neither cast was split or bivalved to allow for swelling and facilitate continued observation of wound areas. Multiple medical complications developed in subsequent days. On July 9, ten days post-accident, Respondent was transferred by ambulance to the University of Nebraska Medical Center at Omaha, Nebraska. There, shortly after his admission, as a life-saving procedure, he underwent above-knee guillotine amputations of both legs (C. A. Appendix 6-9).

During trial, Plaintiff-Respondent called Joseph Lichtor, M.D., an orthopedic surgeon from Kansas City, Missouri, who testified at length, with reasonable medical certainty, concerning acts and omissions of the Defendant-Petitioner which, in his opinion, constituted a failure to exercise the requisite degree of medical care and skill. He further attributed the medical complications and ultimate bilateral amputations to this failure. As permitted under Rule 803 (18) of the Federal Rules of Evidence, he supported his opinions by repeated references to relevant learned treatises. (Note: No attempt has been made to specify those numerous and lengthy portions of the Record or Appendix in the Court of Appeals which support the above recitation of facts because such evidence is not directly involved with the issues raised in the Petition for Writ of Certiorari.) Dr. Lichtor was Respondent's principal medical witness.

As his final defense witness, after almost two weeks of trial, counsel for Petitioner called John J. Alder, a lawyer from Overland Park, Kansas, and elicited testimony concerning Mr. Alder's years of personal acquaint-

ance with judges in the vicinity of Kansas City, Kansas and Kansas City, Missouri—including Federal Judges "such as Judge Denney" (the trial judge in this case) (C. A. Appendix 19-20). Under continued questioning by defense counsel Johnson, witness Alder then proceeded, over objection, to characterize Dr. Lichtor as "a very winsome man . . . and very quick with a word" (C. A. Appendix 20-27). He concluded direct examination testimony by stating that "Dr. Joseph Lichtor's reputation for truthfulness in the Kansas City area is bad." (C. A. Appendix 21).

At no time had the name of John J. Alder been previously disclosed by Petitioner as a possible defense witness (C. A. Appendix 27).

On cross-examination by Plaintiff's counsel, Mr. Alder denied knowledge of the type of case which was being tried and further denied knowledge of having any clients in common with counsel for Dr. Chleborad (C. A. Appendix 20, 21). He testified, however, that he and his firm have represented doctors and hospitals in a number of cases through the years and that the clients who hire him to defend these cases are insurance companies (C. A. Appendix 21). When Respondent's counsel sought to ascertain the identity of these insurance companies to ascertain whether or not the Alder firm might be regular defense counsel for the identical carrier which was providing the defense for Dr. Chleborad, defense counsel objected upon grounds of relevancy and moved for a mistrial (C. A. Appendix 22). The trial judge then gave the following directive to plaintiff's counsel during a bench conference (C. A. Appendix 22):

> "Mr. Mullin: We are certainly entitled to go into this for the purpose of showing his interest when he comes in and goes into his reputation .

> "The Court: But now I don't want insurance to enter this case at all. We've been at this over a week.
>
> . . . . .
>
> "Stay away from that or I will declare a mistrial and we can start all over. Don't go into it any further or I sure will. Do you understand?
>
> "Mr. Mullin: I understand, Your Honor."

As reflected in the Affidavit of Robert D. Mullin attached to Plaintiff's Motion For New Trial (C. A. Appendix 26-28), and in the excerpt from the Alder firm's Martindale Hubbell Listing for 1976 which was attached to the Motion For New Trial and incorporated by reference, the St. Paul Fire and Marine Insurance Company is a regular client of the Alder law firm (C. A. Appendix 28-29). This is the same company which provided the liability insurance coverage for Dr. Chleborad in the present case (C. A. Appendix 29-30). Counsel for Respondent was unaware of this fact when he undertook his exploratory cross-examination of Mr. Alder and did not learn of it until after Mr. Alder had completed his testimony and departed from the Federal Building. (See Affidavit of Robert D. Mullin attached to Motion For New Trial, C. A. Appendix 26-28.)

ARGUMENT

QUESTION I.

A Formal Offer of Proof Was Unnecessary.

At the moment that his cross-examination was interrupted by opposing counsel's objection and motion for

mistrial, and by the trial court's directive to "Stay away from that or I will declare a mistrial and we can start all over. Don't go into it any further or I sure will . . . ", counsel for Respondent had no way of knowing whether or not witness Alder regularly served as attorney for the defense carrier in the Charter case. He was delicately attempting to explore this subject, while avoiding reference to Petitioner's liability insurance coverage, in an effort to uncover possible bias or prejudice in a damaging surprise witness. Under such circumstances must counsel for a party make a formal offer to prove that which he does not know?

The Nebraska Supreme Court has long followed what appears to be the majority rule with respect to omitting the requirement for an offer of proof on cross-examination. As set forth in Syllabus Paragraph 5 of *Rice v. American Protective Health & Accident Co.*, 157 Neb. 256, 59 N. W. 2d 378:

> "5. The rule that ordinarily in order to predicate error upon a ruling of the court refusing to permit a witness to testify, or to answer a specific question, the record must show an offer to prove the facts sought to be elicited, applies to the proponent of the witness *but not to cross-examination.*" (Emphasis by counsel.)

The rationale for the Nebraska rule is set forth in the Arkansas case of *Washington National Insurance Company v. Meeks*, 458 S. W. 2d 135 (1970), in which the Supreme Court of Arkansas held that a proffer of proof is not always necessary on exclusion of testimony sought to be elicited by cross-examination of an adverse witness. In so holding, the Arkansas Supreme Court stated as follows:

> " . . . While we recognize the wide latitude of discretion vested in the trial courts to control and limit cross-examination, we have not hesitated to find an abuse of discretion in undue limitations thereon or abridgement thereof. Arkansas State Highway Comission v. Dean, Ark (December 1, 1969), 447 S. W. 2d 334; Huffman v. City of Hot Springs, Supra."

Continuing:

> "We are not aware of any of our cases which require an offer of proof under the circumstances prevailing here. It is clearly the majority rule that the requirement of an offer of proof does not apply where the testimony excluded was sought to be elicited by cross-examination of an adverse witness, and it has even been said that prejudice may be presumed. (Cases cited.) It has been pointed out that, because of the exploratory nature of the examination, it is unreasonable to require the cross-examiner to make an offer of proof." (Cases cited.)

Also, see the Minnesota case of *Uhlman v. Farm Stock & Home Co.*, 148 N. W. 102, in which Syllabus paragraph 4 reads as follows:

> "4. Where proof is sought to be elicited on cross-examination, and is excluded, it is not necessary to make an offer of proof to present the question for review."

There also exists an additional reason why offer of proof should not be required under the circumstances involved in this appeal.

As announced in *United States of America v. Barash*, 365 F. 2d 395 (1966), an offer of proof need not be made where it would be futile. In the cited case, defense counsel's cross-examination was prematurely terminated by sustaining of objection thereto, coupled with a directive from the Court that counsel should "cut it out". Here,

while the trial Judge was less curt in his directive to "stay away from that", he was no less positive. In the face of this, we submit that a formal offer of proof would indeed have been futile.

Nor do we find a conflict between the lower Court's opinion on this subject and the cases cited by Petitioner at pages 10 and 11 of his Petition. In *Mills v. Levy,* 537 Fed. 2d 1331 (5th Cir. 1976), a Plaintiff was attempting to adduce evidence of objectionable hearsay testimony through his own witness, and failed to make any offer of proof after objection was sustained. And in *Nanda v. Ford Motor Company,* 509 Fed. 2d 213 (7th Cir. 1974), the Defendant was merely restricted as to the number of witnesses he might call to rebut the testimony of an adverse witness. Neither case involved a cross-examination effort to explore the bias or prejudice of an adverse witness.

Finally, Petitioner would have the writ issue because the court of appeals found that the trial court was aware of the "general nature" of the evidence to be offered, as distinguished from the "substance" of such evidence. This distinction, we suggest, is one of semantics rather than law.

In advising the trial court that the purpose of this questioning was to explore the interest of the witness, Petitioner did, in fact, make an offer of proof. Further, so apparent, was the substance of the evidence from the context within which the questions were asked that defense counsel anticipated in advance that if the questioning continued, witness Alder would be forced to disclose that the defense insurance carrier in the Charter case was

and is a regular client of his firm. So apparent was the substance of such evidence to the trial court that the Judge, himself, was immediately able to anticipate the direction and intent of the questioning and foreclose it with his exclusionary ruling and directive. The court of appeals did nothing more than hold that the requirements of Rule 103 (a) (2) of the Federal Rules of Evidence had been satisfied and that no additonal, formal offer of proof was necessary.

QUESTION II.

The decision of the Court of Appeals is tantamount to a holding that the trial Court abused its discretion under Federal Rule 403, 28 U. S. C. A.

Here again, we find ourselves involved with semantics rather than law.

Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" etc. In reviewing the exclusionary ruling of the trial court the court of appeals made the following findings:

1. "In this case the fact that defendant's insurer employed Mr. Alder was clearly admissible to show possible bias of that witness" (following reference to Rule 411).
2. " . . . defendant also argues that the trial court acted within its discretion in excluding evidence of insurance. This argument is without merit."
3. " . . . the probative value of the evidence far outweighs any danger of unfair prejudice."
4. " . . . there is no indication in the record or the briefs of the parties that any particular prejudice

> was threatened in this case. Rule 403 was not designed to allow the blanket exclusion of evidence of insurance absent some indicia of prejudice. Such a result would defeat the obvious purpose of Rule 411."

These findings lead but to the obvious conclusion that the court of appeals found an abuse of discretion by the trial judge. When an opinion recites that it is "without merit" to argue "that the trial court acted within its discretion", it would seem redundant to require that the same holding be repeated in different words.

Here again, the purported conflicts between cited cases are more ethereal than real. In *Construction Ltd. v. Brooks-Skinner Building Company,* 488 Fed. 2d 427 (1973), the Third Circuit did nothing more than express its inability to find that the trial judge abused his discretion under circumstances far different from those in Charter. And in *United States v. Birch,* 490 Fed. 2d 1300 (8th Cir. 1974), a criminal case, the court of appeals did nothing more than affirm its prior holdings that it is the trial judge's duty to weigh the relevance of evidence against the possibility of prejudice and, secondly, re-affirm its long-standing rule that the ruling of a trial court will not be overturned unless the trial court has abused its discretion. Such we submit, is the holding of the court of appeals in Charter—coupled with the finding that the lower court did, in fact, abuse its discretion.

QUESTION III.

Respondent was not required to request that the Alder cross-examination be conducted out of the presence of the jury.

The Alder cross-examination never reached the stage where evidence was offered that the witness was regularly employed by Dr. Chleborad's liability insurance carrier, nor was there ever any reference to the possibility that Dr. Chleborad was himself protected by liability insurance in the present case. If and when defense counsel uncovered evidence that witness Alder regularly represented St. Paul Fire and Marine Insurance Company, assuming that cross-examination was permitted to proceed to this point, request could have been made at that moment to present additional evidence concerning the identity of the Chleborad carrier out of the presence of the jury. To the limited extent that the questioning had proceeded before the exclusionary ruling however, no evidence had been adduced which required that prior cross-examination should have been conducted in the absence of the jury. Petitioner, we suggest, claims error over a threatened evidentiary situation which never occurred. And once again, he fails to demonstrate that the cross-examination which preceded the exclusionary ruling was prejudicial.

Here, the court of appeals did nothing more than find that under the particular circumstances of this case, Respondent was not required by Rule 103 to request examination of witness Alder out of the hearing of the jury. In no sense is this holding in conflict with the footnote dictum expressed in the aircraft crash case of *Hunziker v. Scheidemantle,* 543 Fed. 2d 489 (3d Cir. 1976).

QUESTION IV.

The Exclusionary Ruling Was Not Harmless.

Did the restriction of cross-examination of witness Alder involve the denial of a substantial right? Most certainly so.

It has often been held that the refusal of proper cross-examination is, in fact, "a denial of an absolute right, and has generally been held to be sufficient ground for reversal." See *Washington National Insurance Company v. Meeks,* 458 S. W. 2d 135 (1970) and *Glassman v. Chicago, R. I. & P. Railway,* 147 N. W. 757. Also see *Harris v. Smith,* 372 Fed. 2d 802 (8 Cir. 1967) in which the court of appeals quoted with approval the following words of Judge Learned Hand in *Meaney v. United States,* 112 Fed. 2d 538 (2 Cir. 1940):

> " * * * It is true that the plaintiff did not make any formal offer of proof such as Rule 43 (c), Rules of Civil Procedure, provides for, but while that would have been useful, it was not an absolute condition upon availing himself of the error. * * * If the testimony was competent, its exclusion probably affected 'the substantial rights of the parties'. Rule 61."

Petitioner would have us believe that Mr. Alder's general observation that "I don't know what clients Mr. Johnson has" was legally binding upon Respondent and thereby foreclosed further questioning concerning bias or prejudice of the witness and somehow rendered the erroneous exclusionary ruling harmless. We leave the merit of this argument to the wisdom of the Court.

Further, even before the express authorization set forth in Rule 411, the courts of our land were in virtually unanimous agreement that evidence of liability insurance is normally admissible as a matter of right to show bias or partiality. As provided in Syllabus Paragraph 8 of *Smith v. Hornkohl,* 166 Neb. 702, 90 N. W. 2d 347:

> "8. Generally, on cross-examination of a witness, any fact may be elicited from him which tends to show his bias or partiality, and considerable latitude should be allowed counsel in attempting to do so."

The Nebraska Supreme Court considered this question in more precise form in *Lund v. Holbrook,* 153 Neb. 706, 46 N. W. 2d 130, when it stated as follows in Syllabus Paragraphs 8 and 9:

> "8. Where the fact of whether or not a party carries liability insurance is not relevant to some issue in the case it is not admissible.
>
> "9. If evidence is properly admissible for any purpose, it cannot be excluded for the reason that it tends to prejudice the party because it shows or tends to show that the party carries liability insurance."

We also refer the Court to the annotation in 4 A. L. R. 2d at Page 779 which relates to the admissibility in evidence of liability insurance to show bias or interest of a witness. As stated in the initial paragraph of Section 7 relating thereto:

> "It is usually held that it is permissible for plaintiff's counsel, when acting in good faith, to show the relationship between a witness and defendant's insurance company where such evidence tends to show the interest or bias of the witness and effects the weight to be accorded his testimony." (Numerous cases cited.)

Quite recently, in *Pickett v. Kolb,* 237 N. E. 2d 105 (1968), the Supreme Court of Indiana stated as follows:

> "It has long been the law in all jurisdictions of which we are aware that a witness may properly be cross-examined with respect to his interest in the litigation in question. He may be cross-examined with reference to his motives, his feelings, friendly or unfriendly towards the parties or other witnesses involved, his employment by either of the parties *or*

some third party, and the contractual relationship with reference to his interest in the litigation and any financial considerations that might have influenced him. . . .

"In other words, proof of liability insurance in and of itself is not admissible, but such a principle may not be expanded to the extent that it serves as a means of excluding otherwise competent evidence which is relevant to the issues involved in the trial. . . ." (Emphasis by counsel.)

And again in *Yates v. Grider,* 251 N. E. 2d 846 (Ind. App. 1969), the Indiana Appellate Court held that reversible error was committed in sustaining objection to a question by plaintiff's counsel on cross-examination of defendant's expert witness as to who had hired him to investigate the accident, since a witness may be cross-examined as to possible interest and motives in the litigation, despite the fact that the answer would have indicated that defendant was insured.

We observe no conflict between these cases, or the latest holding by the court of appeals in Charter, and the cited case of *Eichel v. New York Central Railroad Company,* 375 U. S. 253 (1963). In *Eichel* this Court held that the District Court properly excluded evidence of disability income payments received by plaintiff, as offered to impeach plaintiff's motives for not returning to work. It appears that such evidence was being offered through defendant's own witness rather than through cross-examination of an adverse witness concerning his bias or prejudice. Further, the Supreme Court opinion properly observed that any relationship between the receipt of collateral pension benefits and malingering was at most speculative. The circumstances in *Eichel* were far different from those in

Charter and the opinion itself preceded the adoption of Rule 411 by almost a decade.

V.

General Considerations Governing Review on Certiorari

It is difficult to envisage a case less deserving of review by this high court.

As provided in Rule 19 (Supreme Court Rules), a review on writ of certiorari will be granted "only where there are special and important reasons therefore." Such "special and important reasons" must relate to the problems beyond the academic or episodic "and should involve principles of importance to the public," as distinguished from the private interests of the parties to the litigation. *Rice v. Sioux City Memorial Parks Cemetery,* Iowa 1955, 75 S. Ct. 614, 349 U. S. 70, 99 L. Ed. 897.

Here, we perceive no such "special and important reasons." We find no principles, the settlement of which is of importance to the public, as distinguished from that of the parties. Instead, we find nothing more than a request for review of a ruling by a court of appeals upon the narrow question of whether or not a party, on cross-examination, may explore the bias or prejudice of an adverse witness, to the extent specifically authorized under Rule 411, 28 U. S. C. A. This question, we suggest, is both academic and episodic. It in no sense involves constitutional dimensions. And it peculiarly involves the private interests of the parties to this suit, as distinguished from any issue important to the public at large.

CONCLUSION

For the reasons presented, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert D. Mullin, of counsel for Respondent, hereby certify that on the 25th day of July, 1977, I mailed three (3) copies of the Brief For Respondent, correct first-class postage prepaid to:

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